Su Chii Leong (sued as a guarantor) v Orix Credit Malaysia Sdn Bhd

HIGH COURT (KUCHING) — CIVIL APPEAL NO 12–51–2002 OF 111(1)
CLEMENT SKINNER J
5 DECEMBER 2003

Hire Purchase — Hire purchase agreement — Guarantor — Claim against guarantor for an aggregate sum larger than balance originally payable under agreement — Agreement not executed in presence of a magistrate, a Commissioner for Oaths or a notary public — Whether agreement void — Hire Purchase Act 1967 s 22

This is an appeal by the appellant against the decision of the learned sessions court judge granting summary judgment in favour of the respondent in the sum of RM38,191 together with interests. The appellant was sued in his capacity as guarantor to a hire purchase agreement in respect of a motor vehicle. The appellant raised four grounds of appeal. The fourth ground of appeal was that the respondent had failed to comply with s 22 of the Hire Purchase Act 1967 by not having the agreement executed in the presence of a magistrate, a Commissioner for Oaths or a notary public.

Held, allowing the appeal on the fourth ground of appeal with costs in the High Court and in the court below:

(1) The Hire Purchase Act 1967 was enacted for the benefit or protection of the consumer. The purpose behind requiring a guarantor, who binds himself to pay the owner an aggregate sum which is larger than the balance originally payable under the hire purchase agreement, to execute the guarantee before a magistrate, a Commissioner for Oaths or a notary public is to ensure that the guarantor understands the true purport and effect of the agreement he has signed or that he at least has had the opportunity of doing so by attending before such a person, so that he can be said, to have entered into the transaction with open eyes (see para 14).

(2) The point of time at which the guarantor becomes bound under the guarantee is when he executes the guarantee although no liability to indemnify or pay will arise until default under the hire purchase agreement occurs (see para 17).

(3) The appellant had when entering into the guarantee, bound himself to pay the respondent an aggregate sum which is larger than the balance originally payable under the hire purchase agreement. The guarantee should, therefore, have been executed in the presence of a magistrate, a Commissioner for Oaths or a notary public and not having been so executed, is void (see para 19).

[**Bahasa Malaysia summary**

Ini merupakan rayuan yang dibuat oleh perayu terhadap keputusan hakim mahkamah sesyen yang memberi penghakiman terus memihak responden bagi jumlah sebanyak RM38,191 beserta faedah. Perayu disaman atas

sifatnya sebagai penjamin bagi suatu perjanjian sewa beli berhubung dengan sebuah kenderaan bermotor. Perayu membangkitkan empat alasan rayuan. Alasan ke-4 rayuan ialah bahawa responden telah gagal mematuhi s 22 Akta Sewa Beli 1967 apabila tidak menyempurnakan perjanjian sewa beli tersebut di hadapan seorang majistret, seorang Pesuruhjaya Sumpah atau seorang notari awam.

Diputuskan, membenarkan rayuan berdasarkan alasan ke-4 rayuan dengan kos di Mahkamah Tinggi dan di mahkamah bawahan:

(1) Akta Sewa Beli 1967 diperbuat bagi manfaat atau bagi melindungi pengguna. Tujuan di sebalik menghendaki penjamin, yang mengikat dirinya untuk membayar suatu jumlah agregat yang lebih besar daripada baki yang pada asalnya kena dibayar di bawah perjanjian sewa beli kepada pemunya, supaya menyempurnakan jaminan berkenaan di hadapan seorang majistret, seorang Pesuruhjaya Sumpah atau seorang notari awam adalah demi memastikan supaya penjamin memahami maksud dan kuat kuasa sebenar perjanjian yang telah beliau tandatangani itu atau supaya setidak-tidaknya pun beliau mempunyai peluang untuk berbuat demikian dengan menghadirkan diri di hadapan orang itu supaya beliau boleh dikatakan telah memeterai suatu transaksi dengan penuh kesedaran (lihat perenggan 14).

(2) Saat penjamin menjadi terikat di bawah jaminan berkenaan ialah apabila beliau menyempurnakan jaminan tersebut meskipun tidak ada sebarang liabiliti untuk menanggung rugi atau untuk membayar yang akan timbul sehinggalah berlakunya kemungkiran di bawah perjanjian sewa beli berkenaan (lihat perenggan 17).

(3) Perayu mengikat dirinya, apabila beliau memeterai jaminan berkenaan, untuk membayar suatu jumlah agregat yang lebih besar daripada baki yang pada asalnya kena dibayar di bawah perjanjian sewa beli kepada responden. Maka itu, jaminan berkenaan sepatutnya telah disempurnakan di hadapan majistret, Pesuruhjaya Sumpah atau notari awam dan oleh sebab ia tidak disempurnakan sedemikian rupa, ia adalah batal (lihat perenggan 19).]

Notes

For cases on guarantors, see 7(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 3654–3656.

Legislation referred to

Hire Purchase Act 1967 s 4, 5, 16, 22
Hire Purchase Act 1960–1965 [NSW] s 19

Kenny Yi Lee Chuen (Yi & Co) for the appellant.
Lau Mei Ling (Sim & Yee) for the respondent.

Clement Skinner J:

[1] This is an appeal by the third defendant ('the appellant') against the decision of the learned sessions court judge, given on 19 November 2002, granting summary judgment in favour of the plaintiff ('the respondent') in the sum of RM38,191 with interest thereon at 8%pa from 4 July 2000 until full and final payment. **A**

[2] The appellant was sued in his capacity as a guarantor to a hire purchase agreement entered into between the first defendant and the respondent in respect of a motor vehicle. There is no dispute between the parties that the subject matter of the hire purchase agreement is governed by the Hire Purchase Act 1967 ('the Act'). **B**

[3] The appellant raised several grounds of appeal against the decision of the learned sessions court judge. Thus, it was argued that the appellant was not liable under the guarantee because: **C**

(1) the respondent had failed to comply with s 4 of the Act;

(2) the respondent had failed to comply with s 5 of the Act;

(3) the respondent had failed to comply with s 16 of the Act and with r 3 of the Hire Purchase Regulations 1967; **D**

(4 the respondent had failed to comply with s 22 of the Act.

[4] After having heard submissions on all the above points, I indicated that I did not find any merit in the arguments raised by the appellant in support of grounds (1), (2) and (3) above but allowed his appeal on the fourth ground. As the respondent is dissatisfied with my decision made on 31 October 2003, I now give my reasons for the same and will confine myself to the fourth ground only. **E**

[5] The following facts which are not in dispute between the parties are relevant to my decision: **F**

(i) the deed of guarantee and indemnity contained the following express terms and conditions:

  (a) an undertaking by the appellant in clause 1 to indemnify the respondent against all losses, expenses (including legal costs on a full indemnity basis) charges and damages incurred or suffered by the respondent in consequence of any failure by the hirer to perform any of the hirer's obligations under the hire purchase agreement; and **G**

  (b) an undertaking by the appellant in cl 4 to indemnify the respondent against all legal proceedings, claims and demands whatsoever made by the hirer arising out of any alleged warranty and/or representation or otherwise in respect of the said vehicle. **H**

(ii) the appellant did not execute the guarantee in the presence of a magistrate, a Commissioner for Oaths or a notary public; instead, it was executed in the presence of one Ng Mee Kon of UOL Credit Sdn Bhd, Kuching. **I**

[6] I will next state the provisions of 22 of the Act which reads:

> 22 Guarantor not to be bound in certain cases
>
> Where a guarantor of the performance of the obligations of the hirer under a hire purchase agreement enters into an agreement binding the guarantor —
>
> (a) to pay to the owner an aggregate sum which is larger than the balance originally payable under the agreement;
>
> or
>
> (b) to perform an obligation in respect of goods other than the goods comprised in the hire purchase agreement,
>
> the agreement so entered shall be void unless the agreement is executed by the guarantor in the presence of a Magistrate, a Commissioner for Oaths or a Notary Public.

[7] This appeal is concerned with the first limb of s 22 because it is the appellant's case that in entering into the guarantee, he had bound himself to pay the respondent an aggregatesum which is larger than the balance originally payable under the hire purchase agreement.

[8] According to the appellant, this position becomes apparent when a comparison is made between the aggregate of the sums he has bound himself to pay under the guarantee with the balance originally payable by the hirer (first defendant) under the hire purchase agreement.

[9] Thus, the appellant points out that by cl 4 of the guarantee, if the respondent became liable to pay the hirer for the breach of any warranty or representation in respect of the said vehicle, the appellant was obliged to indemnify the respondent in respect of such liability, whereas there was no corresponding clause in the hire purchase agreement which precluded the hirer from bringing such a claim against the respondent.

[10] The appellant further points out that by cl 1 of the guarantee, he became obliged to indemnify the respondent against all expenses, inclucling legal costs on a full indemnity basis incurred or suffered by the respondent in consequence of any failure by the hirer to perform any of the hirer's obligations under the hire purchase agreement, whereas under the hire purchase agreement there was no obligation on the hirer (first defendant) to indemnify the respondent against all legal costs on a full indemnity basis.

[11] Accordingly, the appellant says that he had entered into an agreement binding himself to pay the respondent an aggregate sum which is larger than the balance originally payable by the first defendant as hirer under the hire purchase agreement. That being the case, it is the appellant's stand that the guarantee should have been executed before a magistrate, a Commissioner for Oaths or a notary public as expressly required by s 22 and as it was not so executed, it is void.

[12] As against this, the respondent argued that the appellant had never been asked, as guarantor, to perform any obligation which bound him to pay the respondent an aggregate sum which is larger than the balance originally payable under the hire purchase agreement because firstly, the

balance originally payable under the hire purchase agreement was RM108,466.25. However, the hirer (first defendant) had made some instalment payments so that when default under the agreement occurred, a balance of only RM38,191 was owing and that was the sum demanded from the appellant under the guarantee, which is far less than the balance originally payable under the hire purchase agreement and so there was no need for the guarantee to be executed before a magistrate, a Commissioner for Oaths or a notary public. It was next said by the respondent that under cl 3 of the guarantee, the appellant had agreed to be jointly and severally liable as principal debtor regardless of whether the hire purchase agreement is held to be invalid, unenforceable or terminated, and therefore, the appellant is bound to pay the respondent the sum now demanded from him as principal debtor.

[13] I regret I found both points taken by the respondent untenable. With regard to the respondent's first point, its argument, if upheld, would mean that it is only at the point in time when a demand is made on a guarantor or a suit is brought against him, and not at the time the guarantee is executed, that it is to be determined whether or not the guarantee should have been executed before a magistrate, a Commissioner for Oaths or a notary public. The respondent's argument may be put in another way. What it says is this: If the amount demanded from the guarantor happens to be less than the balance originally payable under the hire purchase agreement, then it matters not whether the guarantee was executed before a magistrate, a Commissioner for Oaths or a notary public even though the guarantor had bound himself, when entering into the guarantee, to pay to the owner an aggregate sum which is larger than the balance originally payable under the hire purchase agreement.

[14] In my judgment, the respondent cannot be right or correct in its argument for the following reasons. The Hire Purchase Act 1967 was enacted for the benefit or protection of the consumer. The purpose behind requiring a guarantor who binds himself to pay the owner an aggregate sum which is larger than the balance originally payable under the hire purchase agreement, to execute his guarantee before a magistrate, a Commissioner for Oaths or a notary public is to ensure that the guarantor understands the true purport and effect of the agreement he has signed or that he at least has had the opportunity of doing so by attending before such a person, so that he can be said, to have entered into the transaction with open eyes. It would defeat the purpose behind s 22 of the Act if the respondent's argument is upheld. I find support for what I say by looking at the position under comparable consumer legislation to our Hire Purchase Act. Such comparison can be found in s 19 of the New South Wales Hire Purchase Act 1960–1965 ('the New South Wales Act') which counsel for both parties referred me to.

[15] Section 19 reads:

(1) Where a guarantor of the performance by a hirer of all or any of hirer's obligations under a hire purchase agreement enters into an agreement binding the guarantor —

(a) to pay the owner under the hire purchase agreement an aggregate sum that is larger than the balance originally payable under the hire purchase agreement;

(b) to perform an obligation in respect of goods other than the goods comprised in the hire purchase agreement;

(c) to permit the owner under the hire purchase agreement or any person acting on behalf of the owner to enter upon any premises for the purpose of taking possession of or inspecting goods subject to the hire purchase agreement;

or

(d) to relieve the owner under the hire purchase agreement or any person acting on behalf of the owner from liability for any such entry;

the agreement so entered into by the guarantor is void (and the owner under the hire purchase agreement concerned is guilty of an offence under this Act) unless the agreement is executed by the guarantor in the presence of a chamber magistrate, a clerk of petty sessions or a solicitor instructed and employed independently of the owner and the magistrate, clerk or solicitor, as the case may be, certifies in writing upon the agreement —

(e) that he is satisfied that the guarantor understands the true purport and effect of the agreement; and

(f) that the guarantor has executed the agreement in his presence.

(2) a chamber magistrate, a clerk of petty sessions or a solicitor shall not give a certificate in respect of an agreement under subsection one of this section unless —

(a) he has read over and explained the agreement to the guarantor or has caused the agreement to be read over and explained to the guarantor in his presence;

(b) he has examined the guarantor touching his knowledge of the agreement;

(c) he is satisfied that the guarantor understands the true purport and effect of the agreement; and

(d) the guarantor has freely and voluntarily executed the agreement in his presence.

(3) Failure by a chamber magistrate, a clerk of petty sessions or a solicitor to comply with subsection two of this section in respect of a certificate does not invalidate the certificate.

[16] Although s 19 of the New South Wales Act is slightly different from s 22 of our Act in that our s 22 does not make it an offence if the owner does not comply with the section and it is not spelt out in our section what a magistrate, a Commissioner for Oaths or a notary public does when a guarantor appears before him to execute the guarantee, in my judgment the objective of both provisions is similar, ie to ensure that when a guarantor undertakes an obligation that is larger than that imposed on the hirer, the guarantor does so voluntarily and with open eyes, fully appreciative of the consequences of such an undertaking.

[17] The point of time at which the guarantor becomes bound under the guarantee is when he executes it although no liability to indemnify or pay thereunder will arise until default under the hire purchase agreement occurs. Notwithstanding the fact that liability under a guarantee is a contingent event which may never materialize, it would only be possible to say that a guarantor has entered into his obligations with open eyes and has had an opportunity to independently decide whether to become so bound or not if he is aware of or has had the opportunity of making himself aware of what he is binding himself to. It must follow therefore that the point of time at which he must 'open' his eyes and be fully appreciative of the consequence of entering into the guarantee is when he executes it and not *ex post facto*.

[18] With regard to the respondent's second point, namely, that the appellant remained liable as principal debtor under cl 3 of the guarantee, I regret I found the argument untenable because we are here not at all concerned with whether the hire purchase agreement is invalid or unenforceable or has been terminated. We are here concerned with whether the guarantee itself is void for the reasons stated in s 22. If it is void, then the guarantee, is worthless and no reliance can be placed on the principal debtor clause found in it.

[19] Reverting to the guarantee which was executed by the appellant in this case, I agree with counsel for the appellant that for the reasons given by him, the appellant had, when entering into the guarantee, bound himself to pay the respondent an aggregate sum which is larger than the balance originally payable under the hire purchase agreement. The guarantee should, therefore, have been executed in the presence of a magistrate, a Commissioner for Oaths or a notary public and not having been so executed, is void.

[20] It was for the above reasons that I allowed the appellant's appeal with costs here and below.

Appeal on the fourth ground of the appeal in the High Court and in the court below allowed with costs.

Reported by Eugene Jayaraj